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JAMES H. McKENNEY,

Clerk.

of Scott & Harlock for P. C.
THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

Filed Feb. 25, 1899.

MAUDE E. KIMBALL,

Plaintiff in Error.

against

No. 942.

HARRIET A. KIMBALL, JOHN S.

JAMES and HARRIET L. JAMES,

Defendants in Error.

In Error to the Surrogate's Court of the County of
Kings, State of New York.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY W. SCOTT,

WALDSGRAVE HARLOCK,

For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

MAUDE E. KIMBALL,
Plaintiff in Error,

VS.

HARRIET A. KIMBALL, JOHN S. JAMES
and HARRIET I. JAMES.

No. 248.

**IN ERROR TO THE SURROGATE'S
COURT OF THE COUNTY OF KINGS,
STATE OF NEW YORK.**

Statement.

A separate brief filed in this case by Waldegrave Harlock and George Bell, for the plaintiff in error, presents a full statement of the facts, specifications and assignments of error, including a full and exhaustive argument upon all the points of law in the case save and except the one discussed in this brief, to which we refer as if the same were incorporated in full herein.

The question we here raise is that under Article 4, Section 1, of the Constitution of the United States, and the Act of Congress of May 26, 1790, and other Acts and Statutes based thereon, the judgment of the lower

Court should be reversed, and the rights of the plaintiff in error under the law as the widow of Edward C. Kimball should be recognized and fully protected.

Article 4, Section 1, reads:

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

See 1 Statute at Large, 122.

The plaintiff in error was married to her first husband, James L. Semon, on the 12th day of May, 1885, and on the 26th day of January, 1891, was divorced from him by a Court of competent jurisdiction in the State of North Dakota, and subsequently on the 29th day of June, 1895, was married to Edward C. Kimball, who died about November, 1896. As his widow she was entitled to administration of his estate and her interest therein as such widow under the laws of the State of New York. The Courts of the said State of New York refused to give full faith and credit to the said decree of divorce of the said plaintiff in error, and in consequence found that she was not the widow of deceased and not entitled to any rights whatever as such.

The additional facts necessary to present the point are included in the argument.

ARGUMENT.

The essential points for argument may be classified in the outset as follows:

1. The divorce granted to the plaintiff in error divorcing her from her first husband, James L. Semon, was valid and under Article 4, section 1, of the Constitution of the United States was entitled to full faith and credit in the State of New York—the same faith and credit, the same force and effect that it had or would have had in case it had been challenged in the State of North Dakota, where it was granted.

2. The amendment of the decree was a judicial proceeding within Article 4, section 1, of the Constitution and the judgment and decree as amended was entitled to full faith and credit in the State of New York as provided in said article.

The second proposition is argued at length in a separate brief, and there is no ground upon which the judgment of the Courts in New York can stand even though the doctrine laid down in that State obtains in this Court, for under the amendment the defendant in the action in Dakota appeared and technically the case comes within the New York rule. While in the argument of the broad doctrine and in our contention that the rule of law in such cases established in New York is not only in violation of the express commands of the Constitution, and an arbitrary disregard of State amity, but a rule that can neither be sustained nor justified upon grounds of public policy, common justice or legal reasoning, we do not wish to be understood as waiving in any degree our contention that the amendment of the decree in the North Dakota court brings the case within the technical rule in New York as before stated and as argued in detail, and entitles us to a reversal of the cause as aforesaid.

We wish to unreservedly claim, however, upon the record in this cause that on the 26th day of January, 1891, James L. Semon and Maude E. Semon, now Maude E. Kimball, the plaintiff in error herein, ceased to be husband and wife, in virtue of a decree of absolute divorce granted to the said Maude E. Kimball in that suit in the State of North Dakota in the manner and form as set forth in the transcript of the record. Semon was a resident of New York and his wife was a resident of North Dakota. Lawful service was had and the decree was awarded in full conformity to and in compliance with the laws of that State. This is not denied. It is only claimed that Semon did not appear, and for the purpose of argument in this point of our brief, that he did not appear will be admitted. No further proof that this decree of divorce is a nullity was required by the New York Courts save and except the fact that the defendant was not personally served in the State of North Dakota or did not voluntarily appear in the action, and further that he was a resident or citizen of the State of New York.

These facts appearing and the Court finds that the solemn judgment of the Court of a sister State is a nullity! The judgment a nullity? Where is it a nullity? Everywhere, according to the sweeping decision of the Surrogate. It is not even permitted to stand in Dakota. It is a nullity, says the Surrogate, in disregard of State amity, the Constitution and laws of the United States, public policy, justice and reason, to say nothing of the sacred claims to wifehood and moral virtue of this plaintiff in error.

It is unnecessary to go into the decisions of the State of New York to any great degree at this time on this question. It is sufficient to say that the following cases, and others as well, established the rule in New York that where the defendant was not personally served in the State in which the decree was rendered, and did not voluntarily appear in the action, and was a citizen of said State of New York, that such decree had no force or effect therein, to wit: *Kinnier v. Kinnier*, 45 New York,

535; *Ferguson v. Crawford et al.*, 70 New York, 253; *Kerr v. Kerr*, 41 N. Y., 272; *McGown v. McGown*, 19 Appellate Division (N. Y.), 368; *O'Dea v. O'Dea*, 101 New York, 23; *People v. Baker*, 76 New York, 78, 82; *Cross v. Cross*, 108 New York, 628; *Williams v. Williams*, 130 New York, 193; *Bell v. Bell*, 4 Appellate Division (N. Y.), 527; *Atherton v. Atherton*, 82 Hun, 179.

But no case has gone to the extent of declaring the decree itself a nullity, as the Surrogate does in this cause.

It is to challenge this doctrine as invoked in this case as well that we appeal to this Court for relief. The learned Justice, writing the opinion states that "it will not be claimed that the judgment as originally entered was valid. It recited the service of summons outside of the State; that the defendant had not answered, demurred, or in any manner appeared in the action. The defendant was a resident of this (New York) State, and the Courts of Dakota had never acquired jurisdiction of his person so as to have the power to order a judgment *in personam* against him. It is only upon the theory that he served an answer in that case, thereby submitting himself to the jurisdiction of that Court, that it can be claimed that the Courts of that State acquired jurisdiction to grant a final judgment against him."

The opinion then goes on to discuss the amendment feature under which we claim the defendant did appear which is not material at this point.

It will be observed from this language that a federal question is here squarely involved and that the highest Courts of New York uphold a rule that declares the divorce of the plaintiff in error herein an absolute nullity. Not only are divorces granted in North Dakota disregarded in New York but divorces in every State in the Union where personal service on voluntary appearance is not had as aforesaid. Still in that State divorces are continually granted on constructive service or service outside of that State under the statutes that are precisely the same. In other words the Courts of New

York refuse to recognize judgments of divorce granted in other States, obtained in pursuance of its precedents and statutes exactly similar in character to those in the said State of New York.

The absurdity of such a rule can best be illustrated by citing the case of *Davis v. Davis*, 2 Miscellaneous Reports (New York), 549. Justice Pryor, however, who decided this case cleared his conscience as best he could and arraigned the absurd doctrine so vigorously, notwithstanding, as an inferior tribunal, he had to pronounce such a judgment as to entirely exculpate himself from criticism.

This case of *Davis v. Davis* was an action to annul a marriage. In a suit by defendant against a former wife in a Massachusetts Court he obtained a decree of divorce on the ground of desertion on constructive service. The decree was challenged as a nullity for want of personal service, and of an appearance by the defendant therein. The sole ground upon which the case was considered was the alleged defect of jurisdiction in the Court of Massachusetts, for the reasons above stated, the other conditions it was held being settled on the authority of the case of *Kinnier v. Kinnier*, 45 New York, 535.

Justice PRYOR, in delivering the opinion thus strikingly and potently arraigns the inconsistency of such a proceeding:

"As the marriage purporting to be dissolved was
 "not celebrated in Massachusetts; as the defendant in
 "the divorce suit was not domiciled in that commonwealth
 "nor was served with process there, nor appeared in
 "the action, it results that by the law of New York the
 "judgment against her is of no effect; that she is still
 "the wife of the defendant, and that by necessary consequence his marriage with this plaintiff is a nullity.

"*To this conclusion I am compelled; but I am not
 "forbidden to say that my reason revolts against it.*
 "By the law of Massachusetts its Court had jurisdiction
 "of the defendant in the divorce suit, and the decree of
 "divorce is valid and conclusive. By virtue of the supreme law of the nation, 'a decree in divorce valid and

“effectual by the laws of the State where obtained is
 “valid and effectual in all other States’ (Cheever v.
 “Wilson, 9 Wall., 109); yet I am to declare this Massa-
 “chusetts judgment a nullity. And why? *Because*
 “*the jurisdiction of the Massachusetts Court rests solely*
 “*on a constructive service of process by publication,*
 “*and by the law of New York such service is of no*
 “*avail. But such constructive service is the only founda-*
 “*tion of the jurisdiction of this Court in the present*
 “*case, yet by the law of New York such service gives jur-*
 “*isdiction to its Court, and the judgment I am to render*
 “*is not only valid, but of so transcendent an efficacy as*
 “*to impeach the records and cancel the judicial pro-*
 “*ceedings of another State. In reason such services of*
 “*process should be sufficient in both States or in neither.*

“Equally anomalous will be the effect of the judg-
 “ment of this Court on the relation and rights of the
 “parties. In Massachusetts, not the former spouse, but
 “this plaintiff, is the lawful wife of the defendant; while
 “in New York the former spouse is still the wife of the
 “defendant, and his connection with the plaintiff is a
 “crime. Indeed, relying on the nullity of the Massa-
 “chusetts decree, the former wife has instituted here an
 “action for divorce from the defendant, on the allega-
 “tion that his marriage with this plaintiff is an adulter-
 “ous association. The Executive of New York may de-
 “mand from Massachusetts the rendition of the defend-
 “ant as a bigamist, but can he be a bigamist whom
 “Massachusetts had released from a former marriage?

“*The absurd and mischievous consequences of the*
 “*present judgment do not relieve me from the necessity*
 “*of pronouncing it; but, perhaps, the exposition of*
 “*them may not be amiss in the prevalent agitation for*
 “*a uniform system of marriage and divorce.*”

Were we disposed to use forcible language in setting forth the extraordinary results likely to follow an inexorable enforcement of the rule referred to, our courage would fail us in the face of the words of Mr. Justice Pryor. We are quite content to refrain from a further discussion of the question or an expression of approval or disapproval, as to the wisdom of giving judicial sanction to a rule of law that is absolutely indefensible.

To sum up the whole controversy, it simply amounts to this: That the plaintiff in error, on account of the mistreatment and cruelty of her husband, left him and settled in another State, and while resident there invoked the laws on the subject of divorce. This is done in every part of the United States, and the practice has arisen on account of the deplorable condition of these laws as a whole. Such conflicts as those appearing in the present case will continue unabated until some uniform system of laws upon the subject of divorce or marriage and divorce is enacted. The plaintiff in error is not responsible for the law in either State and it would not be right to say that a citizen of the United States is not entitled to avail himself or herself of the laws of the land as the plaintiff in error did in the State of North Dakota as shown by the record in this case. Thus we are forced to contend for the universal rule that a divorce good where granted is good everywhere, and a marriage in pursuance thereof and valid where solemnized is valid everywhere, rather than to submit to one that is purely local and when applied universally or to the test of reason and the law terminates in hopelessly untenable and absurd results.

Another observation. The Courts of New York say that the Courts of another State shall not adjudge the *status* of citizens of that State. The word *status* as applied to citizens of New York and the universal rule governing the subject of marriage and divorce is a misnomer. It means nothing. The term is misapplied. Hearing and determination of a legal controversy in a divorce action or any other is not adjudging the status of the parties to such suit or suits as citizens. Adjudging the marriage status or dissolving the marriage bond or determining any other legal controversy between the parties does not involve their status in the sense applied. A divorce cause is an action *in rem*, and the Courts of the State in which the *res* or *rem* is situated if we may be pardoned for thus applying the terms, has jurisdiction absolutely to fully adjudicate all questions concerning it.

Such Court obtains jurisdiction in virtue of having the plaintiff in the action and the subject matter lawfully in Court and it is immaterial so far as a dissolution of the marriage bond is concerned whether the defendant in such an action is in Court or not. The marriage bond being dissolved by the release of the plaintiff from its obligations leaves the defendant free also, for the plaintiff is no longer bound or tied to him because of such release. It may satisfy a Court or a defendant to say that the defendant in such a case is not affected by the decree, but the fact remains that a Court of competent jurisdiction has released the plaintiff and therefore it is impossible in reason or rationality for the plaintiff to still be bound to a condition from which the Courts and the law of a sovereign State has "unbound" him. Such precedents in a State are the result of a local sentiment which upholds a Court in making such decisions and Courts may unconsciously err on the side of a supposed moral question.

This discussion does not uphold persons who act fraudulently in obtaining divorces any more than fraud or imposition in any other proceeding would be upheld but we do say that it is not right for the Courts of the State of New York or any other State to establish a rule of law designed for the purpose of taking in those who act fraudulently and in such a drag-net victimize hundreds if not thousands of innocent persons. There is no more reason or sense in violating the law and the Constitution in cases of this character in order to prevent a person who had practiced fraud and imposition in another State from enjoying the fruits of it in New York and at the same time victimizing countless hundreds of innocent persons than there would be in violating the law and the Constitution in an attempt to prevent a murderer from going unwhipped of justice because under the provisions of the Constitution and laws in virtue of some technicality he would be entitled to his liberty, and in preventing such an alleged miscarriage of justice establish a rule of law that would send a thousand innocent men to the gallows.

The rule in New York and in some other States works great hardships in many directions. To say nothing of the demoralizing conditions brought about in regard to the marriage status, the property interests and the legitimacy of the offspring is brought in question. In a State where decrees of divorce are accorded full faith and credit the children of subsequent marriages are held legitimate, and their property rights fully recognized, and the widow awarded her statutory or dower interests in the estate of her deceased husband, while in others, in New York for instance, the same children would be held to be bastards and the widow a concubine. Under Art. 4, Sec. 1, of the Constitution, it is said that full faith and credit shall be given to judgments of other States. There is no qualification in this article. It must either be said that a decree or judgment of divorce is not a judgment or judicial proceeding or if it is conceded to be a judgment or judicial proceeding with any efficacy whatever, it must be given the same faith and credit that it has in the State in which it was rendered.

This plaintiff in error is one of the innocent victims of this kind of law. The record may be searched in vain for a single fact or a single legal reason for denying full faith and credit to this decree of divorce except that the defendant, Semon, did not appear in the Dakota Court.

There is no contention that the laws and statutes of Dakota were not fully complied with nor that there was any fraud in the proceedings from beginning to end; nor that any of the recitals in the original decree are not conclusive in law as against the world unless attacked in the forum in which the judgment was rendered. In fact nothing was urged against the decree except as above stated. In *Cheever v. Wilson*, 9 Wallace, 109, it is held that "where the record shows that the wife was a resident of Indiana for the length of time required by its laws before commencing an action for divorce the Courts of Indiana have jurisdiction, and the judgment will be given full force and effect in the other States."

In the same case, page 123, it was also held:

"That she did live in the county where the petition was filed, is expressly found by the decree. Whether this finding is conclusive or only *prima facie* sufficient, is a point on which the authorities are not in harmony.

"We do not deem it necessary to express an opinion upon the point. *It is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record.* Giving to what there is the fullest effect it only raises a suspicion that the *animus mandandi* may have been wanting. * * *

"The proceedings for divorce may be instituted where the wife has her domicile. The place of the marriage, of the offence, and the domicile of the husband are of no consequence."

2 Story on the Constitution, §1313; D'Arcy v. Ketchum, 11 Howard, 175; Christmas v. Russell, 5 Wallace, 302; McDonald v. Smalley, 1 Peters, 620; Ditson v. Ditson, 4 Rhode Island, 87; Barber v. Barber, 21 Howard, 582.

If constructive service is of no avail, then the domicile of the husband would be of all importance, and unless he chose to appear a valid decree could only be obtained in the courts of his domicile, which the above language positively denies. And if he did appear the decrees might be challenged as collusive.

Would the Court say that his domicile was of no consequence if a decree could not be obtained elsewhere except by his consent? And being obtained by his consent say that the same was not collusive?

Article VI. of the Constitution says:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The decisions of the Supreme Court of the United States are equally the supreme law of the land and binding on the Courts of every State as against any local rule or statute.

In *Ennis v. Smith*, 55 U. S., at page 400, this language is used:

"The presumption of law is that the domicile of origin is retained until residence elsewhere has been shown by him who alleges change of it. *But residence elsewhere repels the presumption and casts upon him who denies it to be a domicile of choice the burden of disproving it.*"

Declarations of domicile have always been received as proof in England, France and the United States (see cases cited in note 1, 55 U. S., page 400). Reference to the record will show that nowhere did defendants introduce one word of testimony or evidence of any kind in opposition to the validity of the decree. They did not call a witness or present a document. Neither in the pleadings nor on the trial was a scintilla of evidence produced by defendant on the question of the residence of the plaintiff, even if that question would have been a proper subject of inquiry.

The evidence of the plaintiff in error is true and stands undenied and unimpeached, that she went to North Dakota with the intention of becoming a *bona fide* resident, and did reside there as found in the decree.

The findings in the decree show that she was a resident in good faith for the length of time required by the law of North Dakota before the commencement of the action.

In every case in the State courts even where residence has been successfully attacked, it has been shown that the person had left material interests or possessions or business in the State of original domicile which were supposed to keep up the domicile.

In this case it is not shown that the defendant had a dollar's worth of real or personal property or any other tie to bind her in the State of New York or elsewhere during her residence in Dakota.

In *Pollock v. Pollock*, 58 N. W. Rep., 176, it was held that the plaintiff's uncontradicted testimony that he settled in Dakota for the purpose of becoming a resident there, and that it had been his home since his arrival until the trial, is sufficient to justify a finding that he was a *bona fide* resident.

In case of *Coulborn v. Coulborn*, a Michigan case, referred to by the Court in 5 N. Y. Supplement, at page 94, the Court went so far as to find that where plaintiff sought employment in Michigan and left no ties in the State of his former residence, that a *bona fide* residence was obtained even though he testified that his main purpose in going to Michigan was to obtain a divorce.

Kent's Commentaries, page 346, Vol. I., give out the doctrine that it was sufficient to give jurisdiction to the Federal Court that a citizen had really and not merely nominally removed to another State, though his motive might have been to prosecute an action in the United States Court. It was sufficient that the plaintiff was in fact a citizen of one State and defendant of another. The motive of removal was not to be inquired into (see *cases cited*). If the question of motive cannot affect rights of a citizen to maintain actions in the Federal Courts, it is difficult to see how it can create disability when applied to State Courts.

This is a point worth thinking about. Imagine the spectacle of a United States Circuit Court in California finding that a United States Circuit Court in the State of New York had no jurisdiction over a cause in which a final judgment had been ordered in the latter State in said Court for the reason that the Court in California had retried the question of the alleged citizenship of the plaintiff in New York and had found that said Court had erred in its finding.

"It would be sufficient answer to the questions as to the validity of the decree that no such issue is made in the pleadings. If he wished to assail the decree he should have stated clearly the grounds of objection on which he proposed to rely." *Cheever v. Wilson*, 9 Wall., 122.

A special plea in bar of a suit on a judgment in another State to be valid must deny by positive averments every fact which would go to show that the Court in another State had jurisdiction of the person or of the subject matter. Kent's Commentaries, Vol. I., page 281, and Vol. II., page 95, note and cases cited.

The decree of a sister State can be attacked for lack of jurisdiction only where it is shown that there was usurpation of jurisdiction, but not for fraud, error nor negligence. Kent's Comment., Vol. II., page 121 (14th edition), cases cited in note.

This Court has laid down as a universal principle that when power or jurisdiction is delegated to any public officer or tribunal over a subject matter and its exercise is confined to their discussion, the acts so done are binding as to the subject matter and individual rights will not be disturbed, collaterally for anything done in that discretion within the authority and power conferred. The only question which can arise between an individual claiming rights under the acts done and the public or any person denying their validity are power in the officer or fraud in the party. *U. S. v. Arredondo*, 6 Peters, 691; *Voorhees v. Bank of U. S.*, 10 Peters, 475; *Wilcox v. Jackson*, 13 Peters, 511; *Shriver's Lessee v. Lynn*, 2 How., 59, 60; *Hickey's Lessee v. Stewart*, 3 How., 762; *Williamson v. Berry*, 8 How., 546.

We must repeat that this decree is not challenged for any of these reasons, but we have made the points thus briefly in this connection in anticipation of any claim of that kind in this Court by our opponents, and for the further reason that we feel in view of the thousands of persons throughout the entire country who are affected in one way or another by a local rule in some State of the Union, and the general doctrine being fairly in the case and in view of future litigation between the parties hereto, that the Court should declare itself as was done in the case of *Cheever v. Wilson* (see page 122), so that expensive litigation may be avoided and also some relief afforded from the continual aggressions in many

States in cases of this character in violation of Article 4, Section 1, of the Constitution.

We hope that the Court will go as fully into the entire questions referred to in the briefs as the record in this case will warrant.

The writer has long advocated a uniform law upon the subject of divorce, and the very basis of that contention has been that divorces granted in a State in full compliance with its laws, whether the defendant was in Court by personal service or voluntary appearance or only summoned constructively, are valid and binding and entitled under Article 4, Section 1, of the Constitution, to full faith and credit in every other State. A State cannot in violation of the Constitution and laws establish a rule that is a law unto itself. The remedy should come through plain, adequate and unmistakable legislation, within the Constitution.

Thus we have presented the iniquity of this conflict of jurisdictions and local State rules upon this subject, and now come back to the fundamental law that must govern in the end this as well as all cases of like character.

Article 4, Section 1, of the Constitution of the United States, reads:

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

See also 1 Stat. at Large, 122.

On the 26th day of May, 1790, Congress enacted that *"the records and judicial proceedings should have faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from whence such records are or shall be taken."* From that day until this there has never been any question raised against a judgment regularly obtained in one State when enforcement was at-

tempted in any other State in the Union, excepting judgments for divorce. While it is true that when a judgment is void in the State in which it is obtained, it is void in any other State, yet, there are only certain known methods of attacking the validity of them. Such judgments and decrees must either be void on their face or it must be clearly shown that they are void for the reason that they were not rendered in accordance with the laws of the State in which they were obtained. It is not proper for the Court of a sister State to enter into a trial of the facts upon which a judgment or judicial proceeding of a sister State is based. For instance, if the judgment of such sister State solemnly finds that an applicant for a divorce has resided for a given period of time in good faith in such State, and such fact is found from the evidence in the case, it is clearly incompetent for the Courts of a sister State to retry that question of fact. If false testimony has been admitted and the Court imposed upon, that question must be determined in the forum in which the judgment was rendered, on a proper application to vacate it, but in this case no such proof was offered. These rules are so well known that it is useless to cite specific authority in support of them. The Constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that the citizens in each State shall be entitled to all the privileges and immunities of citizens of the several States, and that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside.

The individual, as well as the State, can demand full credit and faith to proceedings that affect him, and a full vindication of his rights. A judgment in divorce, granted in one State to a *bona fide* resident, according to the law of that State, must be given full faith and credit in any other State, though it may not be granted on grounds recognized in such other State.

Divorce is a rightful subject of legislation in the various States and Territories. It does not come within the designation of common law and chancery jurisdiction. It is neither civil nor criminal. It is *sui generis*. It was formerly the subject of ecclesiastical jurisdiction.

In this country it is entirely the creation of statute, and, while marriage may be solemnized by authority of the church, the dissolution is entirely with such Courts as may be designated by the lawmaking power of the jurisdiction, or, unless prohibited by the Constitution, the lawmaking power itself may dissolve the marriage. Prior to 1857, the subject of divorce in England belonged to the Ecclesiastical Courts and to Parliament. In 1857, Chapter 85, Statutes 20 and 21, Vict., gave exclusive jurisdiction in all matrimonial cases to the Court of divorce and matrimonial causes, but now such matters are heard in the divorce and probate division of the high Court of Justice, with the right of appeal.

In our own country, divorces have frequently been granted by the State Legislature. We have a record of one granted in the Territory of Oregon in 1852, which was upheld by the United States Supreme Court, in the case of *Maynard versus Hill*. It has been done in the State of Connecticut and other States of the Union.

When the Court of a sister State solemnly declares by its judgment, that under the law of that State a husband and wife are lawfully divorced, it is then lawful for them to remarry, and it is a well settled rule of law that when the marriage is valid in the *lex loci contractus* it is valid everywhere. In divorce cases a period of residence of the plaintiff is required, but in marriage it is not so. Marriage can be contracted anywhere at a moment's notice according to the laws of the *lex loci* and in many States of the Union and, in fact, in all of them unless an express statute forbids, the Courts uphold marriage by consent as at common law.

As early as 1813 Justice Story, construed the act of Congress heretofore cited and the Constitution of the

United States in the case of *Mills v. Duryee*, 7 Cranch, 481, holding that a judgment obtained in one State is conclusive in all others, and that such a judgment has the same effect in every other State that it had in the State in which it was obtained. In commenting upon this case Justice Story declared that the intent of the provision of the Constitution of the United States and the act of Congress was to give conclusive effect to such judgments.

Chief Justice Marshall, in *Hampton v. McConnell*, 3 Wheaton, 234, affirms the doctrine above referred to.

In that case it was held:

"A judgment of the State Courts should have the same credit, validity and effect, in every other Court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to the suit thereon in such State and none others, could be pleaded in any other Court in the United States."

The Supreme Court of the United States to the present day has followed the decisions of Chief Justice Marshall and Justice Story in a long unbroken line of decisions.

In *Cheever v. Wilson*, 9 Wallace, 123, this Court as before stated upholds a decree of divorce awarded in Indiana. In that case it was held that the petition laid the proper foundation for the subsequent proceedings and warranted the exercise of the authority which was invoked (divorce). It contained all the necessary averments. The Court was the proper one before which to bring the suit. It had jurisdiction over the parties and the subject-matter. The decree was valid and effectual according to the law and adjudication in Indiana. The Constitution and laws of the United States gave the decree the same effect elsewhere that it had in Indiana. If a judgment is conclusive in the State Court wherein it is rendered, it is unquestionably conclusive everywhere in the Courts of the United States.

The case of *Cheely v. Clayton*, 110 U. S., 705, opinion by Justice Gray, decided a case involving the

validity of a decree of divorce obtained in the Territory of Colorado before that State was admitted into the Union. The following language which applies precisely to the general doctrine we contend for in the case under consideration is used:

"The Courts of the State of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws without regard to the place of the marriage, or to that of the commission of the offense for which a divorce is granted; and a divorce so obtained is valid everywhere. If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile, and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile after reasonable notice to her either by *personal service* or *publication* in accordance with its laws is valid, although she never resided in that State.

"But in order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit have been such notice to her as the law of the first State requires. Citing Story Conflict of Laws, §230a; Cheever v. Wilson, 9 Wallace, 108; Harvey v. Farnie, 8 App. Cas., 43. Also Burlen v. Shannon, 115 Mass., 438; Hunt v. Hunt, 72 New York, 218."

This case alone is decisive of this cause. The element of constructive service arises and it is hard to conceive how the Courts of New York can refuse to recognize the decree herein in the force of such an imperative declaration of the law by this Court. To thus refuse is a species of State egotism that cannot be justified from any point of view.

Section 2579 of the Territorial Code now section 2755 of the Civil Code of North Dakota provides that "in actions for divorce the presumption of law that the domicile of the husband is the domicile of the wife does not apply. After separation, each party may have a separate domicile, depending upon proof upon actual residence and not upon legal presumptions." (See Transcript of Record, page 49.)

There is no contention, and never has been as before stated, that the decree in this case was not granted and obtained in full compliance with the laws of the State of North Dakota.

The defendant in this action had the right to invoke the laws on the subject of divorce after she had established her residence, and, as a resident, she had the right to institute an action for a divorce. So it will be observed that the case of *Cheely v. Clayton* is in point as clearly for the benefit of a wife as for the benefit of a husband. According to the decree, the defendant in this action, James L. Semon, had committed a matrimonial breach, and the wife, therefore, had a right to take up a domicile independent of his, and an adjudication of the marital status was a proper subject of jurisdiction in that Court, and when that Court dissolved it no marriage tie or bond remained for the Court of New York to take jurisdiction on, to pretend to disregard.

In *Cheever versus Wilson*, above cited, this precise point is referred to in the following manner:

"It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled it would be idle to discuss it. The rule is that she can acquire a separate domicile whenever it is necessary or proper for her to do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense and the domicile of the husband are of no consequence."

The later case of *Cheely versus Clayton*, above referred to, holds that the plaintiff in an action is only required to give such notice to the defendant as the law of the State in which the action is instituted requires.

Vol. 2, Black on Judgment, 822, referring to this subject uses the following language:

"In America it is generally held, and indeed almost

"universally, that as proceedings in divorce is intended
 "to effect the status of the parties and is, therefore,
 "essentially in *rem.*, the judgment pronounced, whether
 "in a foreign country or state, by a Court having lawful
 "jurisdiction of the cause, and in the absence of fraud,
 "is valid and binding everywhere, and in all subsequent
 "controversies, provided the applicant was *bono fide*
 "domiciled within the territorial jurisdiction of the
 "Court, although the other party being a non-resident,
 "was notified only by advertisement or some other species
 "of constructive service." Citing *Pennoyer v. Neff*, 95
 U. S., 714; *Roth v. Roth*, 104 Ill., 35; *Ditson v. Ditson*,
 4 R. I., 87; *Tolen v. Tolen*, 2 Blackf., 407; *Burlen v.*
Shannon, 115 Mass., 438; *Hood v. Hood*, 110 Mass.,
 463; *Wright v. Wright*, 24 Mich., 180; *Harding v.*
Alden, 9 Me., 140; *Rush v. Rush*, 46 Iowa, 648.

See also 2 Bishop, Marriage and Divorce, §§ 155-164; also Black on Judgments, Vol. 2, §§ 925-933.

See also Brown on Jurisdiction, §§ 76, 77, citing *Gelpcke v. City of Dubuque*, 1 Wall., 206; *Thompson v. State*, 28 Ala., 17; *Richmond v. Smith*, 15 Wall., 438; *Kline v. Kline*, 57 Iowa, 386; *Wall v. Williamson*, 11 Ala., 826; *Fellows v. Fellows*, 8 N. H., 160; *Turner v. Turner*, 44 Ala., 437; *Hood v. Hood*, 11 Allen, 196; *Beard v. Beard*, 21 Md., 321; *Shreck v. Shreck*, 32 Tex., 578; *Shafer v. Bushnell*, 24 Wis., 372, and numerous others (somewhere) referred to in the brief.

Black on Judgments, Vol. 2, Section 932, says:

"So now the rule may be regarded as settled by the
 "great preponderance of authority that a decree of di-
 "vorce pronounced by a competent Court in favor of a
 "*bona fide* domiciled citizen of the State and against a
 "non-resident, where service of process was made upon
 "reasonable constructive notice, and in the absence of
 "any fraud or collusion is valid and binding both in
 "that State and in all other States." Citing *Pennoyer*
v. Neff, 95 U. S., 714, 734, from which he quotes cop-
 ously from the opinion of Justice Field in that case up-
 holding squarely the doctrine we herein contend for.

See also *State v. Schlachter*, Phill. (N. Car.), 520;

Hull v. Hull, 2 Stroph, 174; Cooley Const. Lim., 401 and Note; 2 Kent Comm., 110; Cook v. Cook, 56 Wis., 195; Gould v. Crow, 57 Mo., 200; Wakefield v. Ives, 35 Iowa, 238; Wilcox v. Wilcox, 10 Ind., 436; Mansfield v. McIntyre, 10 Ohio, 28.

Under this fourth article and first section of the Constitution and the Act of May 26, 1790, if a judgment has the effect of record evidence in the Courts of the State from which it is taken, it has the same effect in the Courts of every other State, and the plea of *nil debet* is not a good plea on action brought upon such judgment in a Court of another State. Mills v. Duryee, 7 Cranch, 483; 2 Cond. Rep. 578. See Leland v. Wilkinson, 6 Peters, 317; U. S. v. Johns, 4 Dall, 412; Ferguson v. Harwood, 7 Cranch, 408; 2 Cond. Rep., 548; Drummond's Admr's v. Margruder's Trustees, 9 Cranch, 122; 3 Cond. Rep., 303.

In an action upon a judgment, in another State, the defendant cannot plead any fact in bar which contradicts the record on which the suit is brought. Field v. Gibbs, Peters C. C. R., 155. See Green v. Sarmiento, Peters C. C. R., 74; Blount v. Darrah, 4 Wash. C. C. R., 657; Turner v. Waddington, 3 Wash. C. C. R., 126.

In *Christmas v. Russell*, 5 Wall., 302, the Court say:

"When the question of the construction of that act of Congress was first presented to this Court it was argued that the act provided only for the admission of such records as evidence; that it did not declare their effect; but the Court refused to adopt the proposition, and held, as the act expressly declares, that the record, when duly authenticated, shall have in every other Court of the United States the same faith and credit as it has in the State Court from whence it was taken."

Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits—citing 2 Story on Const (3rd Ed.) § 1313 which declares that "if a judgment is conclusive in the State where it is pronounced, it is equally conclusive everywhere."

Nearly all of the States hold that a divorce decree of another State rendered on publication service that is valid in the State where rendered will be valid in the State where presented. In some of these cases, however, the question of jurisdiction in the State granting the divorce was not contested when the record was offered. *Hull v. Hull*, 2 Storbh. Eq., 174; *Thompson v. State*, 28 Ala., 12; *Thompson v. Thompson*, 11 L. R. A., 443, 92 Ala., 545; *Van Orsdal v. Van Orsdal*, 67 Iowa, 35; *Wakefield v. Ives*, 35 Iowa, 238; *Harding v. Alden*, 9 Me., 140, 23 Am. Dec., 549; *Loker v. Gerald*, (Mass.), 16 L. R. A., 497.

Rendleman v. Rendleman, 118 Ill., 257, holds that the Court will be presumed to have jurisdiction.

Hawkins v. Ragsdale, 80 Ky., 353, 44 Am. Rep., 483, that a divorce decree of another State on publication service bars dower in Kentucky.

But in *Mansfield v. McIntyre*, 10 Ohio, 28, a decree of a Kentucky Court on publication service was held not to bar dower in Ohio, as the Ohio statutes applied only to divorces rendered in Ohio and the Kentucky decree was somewhat imperfect, although it is conceded without question that the marriage bond was dissolved.

In *Burlen v. Shannon*, 115 Mass., 438, the decree was sustained under the Massachusetts statute providing for the validity of foreign divorce.

Waldo v. Waldo, 52 Mich., 94, squarely holds that the record cannot be impeached collaterally which shows an appearance.

In *Gould v. Crow*, 57 Mo., 200, there was no effort to impeach the decree, the contest being over the jurisdiction of the Court of Common Pleas Courts of Indiana, but it was conceded that the decree was entitled to full force and credit under the Constitution.

So in *Hunt v. Hunt*, 72 N. Y., 217, 28 Am. Rep., 129, affirming 9 Hun, 622, the divorce was upheld on the ground that the Court of the other State had jurisdiction of the subject-matter and of the persons, and this though the defendant was not personally served or

did not voluntarily appear but was only served by substitution services.

In *re Morrison*, 52 Hun, 102, the plaintiff lived in Ohio, the cause occurred in Ohio, and was a good cause for a divorce in New York, and it was held that the heirs of plaintiff could not assail the Ohio divorce.

In *Cooper v. Cooper*, 7 Ohio, Pt. 2, p. 238, no grounds were shown against the Indiana divorce decree in the Ohio Court, and it was upheld under Art. 4, section 1, of the Constitution.

In *Shafer v. Bushnell*, 24 Wisconsin, 372, the cause occurred in Wisconsin and was ground for divorce there, and a divorce obtained in another State by publication was sustained in Wisconsin through comity.

In *State v. Schlachter*, 61 N. C., 520, a divorce obtained by a wife while the husband was (in the army) in New York, where she was domiciled, was upheld in a criminal proceeding in North Carolina for living in adultery after the wife had married in New York and then come to North Carolina with her second husband. This case is sometimes cited as overruling *Irby v. Wilson*, 21 N. C., 568, and in a suit for divorce the defendant must answer the charge that he had falsely sworn in another State in order to procure a divorce on publication that complainant's residence was unknown, unless he shows that perjury was punishable in that State so as to excuse meeting that part of the bill of complaint. *Fairchild v. Fairchild*, 43 N. J. Eq., 473.

See Ohio cases not heretofore cited, *McGill v. Deming*, 44 Ohio State, 449; *Doerr v. Forsythe*, administratrix, 50 Ohio State, 726; *Graves v. Graves*, 50 Ohio State, 196.

The opinion in the case of *Felt v. Felt*, 40 Atlantic Reporter, 436, recently decided (May, 1898), the Court of Chancery of the State of New Jersey discusses this question very ably, referring to the precedents in that State, and also severely criticising the New York rule.

In this case it appeared that a husband, being a domi-

ciled resident of Utah, brought suit in a Court of that Territory against his wife, residing in New Jersey, for divorce, on the ground of desertion, and served her personally in New Jersey with a copy of his complaint and summons. She made no appearance or defense, and, after more than two months from such service, default was entered against her; and, upon proofs produced to the Court, a decree of divorce was granted. It was held that such decree was a defense to a suit by the wife against the husband for divorce in New Jersey.

We quote from the opinion:

"The whole subject is discussed by Mr. Bishop in the second volume of his recent treatise on Marriage, Divorce and Separation (sections 1-152, inclusive, and particularly sections 142-152). In the earlier sections of that volume he calls attention to the distinction between jurisdiction for the purpose of a pecuniary decree against the person, and jurisdiction for the purpose of declaring a *status*; holds, with Chancellor Zabriskie, that a suit for divorce is a proceeding *in rem*; and shows that a decree of divorce may be valid for the purpose of ending a marriage *status*, while it would not be valid for the purpose of enforcing a personal decree for alimony in the foreign jurisdiction. This distinction has not always been kept in mind. The New York cases referred to, as I read them, go upon the basis that the marriage *status* may be held to have come to an end in the State in which the decree is declared, and still exist in all the other States of the Union. I confess I am unable to see how that solution of the difficulty accords with reason. If one State in the Union has power to declare, and in a suit brought by one spouse against the other, in which the best notice practicable has been given to that other, does declare, upon grounds recognized by civilized men to be sufficient, that a once husband is no longer a husband, and has no wife, I do not see how it can be held in any other State that such person is still the husband of his former wife, and that she is still his wife. Moreover, such a doctrine seems to me to be contrary to pub-

"lic policy. Its noxious tendency was well exemplified
 "in the leading New York case of *People v. Baker* (76
 "N. Y., 78). There the defendant, Baker, while liv-
 "ing in New York, had been sued by his former wife, in
 "Ohio, for divorce and a decree of divorce rendered
 "against him, based upon substituted service. Relying
 "upon that decree, he contracted a marriage in New
 "York, was indicted for bigamy, based on such second
 "marriage, and convicted and sentenced to State's
 "Prison. We have not here to deal with a case where
 "the ground of the divorce, as found by the foreign tri-
 "bunal, was frivolous, or not in accordance with recog-
 "nized principles underlying the marriage state, or
 "with a case where any imposition, fraud or conceal-
 "ment was practiced upon either court or party. On
 "the contrary, actual notice was given, and time to ap-
 "pear and defend allowed. Nor is it alleged that the
 "wife was for any cause unable to defend, or that she
 "had a defense which she now seeks to set up. We are
 "bound to presume that the finding of the Court of Utah
 "was based upon sufficient and unassailable evidence.
 "Hence it appears that no injustice was done the wife.
 "I find nothing in our own decisions which contra-
 "venes the result at which I have arrived, and I think
 "that it is fully sustained by the reasoning of Chief
 "Justice Beasley in *Doughty v. Doughty* (28 N. J. Eq.,
 "586). The decree of the Court of Chancery granting
 "a divorce in that case which was somewhat similar to
 "this, was sustained, on appeal, distinctly on the ground
 "that the decree of the State of Illinois there set up as
 "a defense was not a decree in a suit for divorce, but
 "was one in a suit of jactitation of marriage, and also
 "on the ground that notice of it failed to reach the de-
 "fendant, by reason of designed neglect on the part of
 "the plaintiff in the foreign decree to take proper pains
 "to give her actual notice. The learned Chief Justice,
 "in dealing with the question, distinctly declared that
 "it would be necessary for our Courts, on the ground of
 "comity, to recognize the validity of foreign divorces,
 "obtained by substituted service, upon fair proceedings
 "and proper grounds, against residents of this State.
 "He held that as our system provided for the procura-
 "tion of divorces against absent spouses, and expected

“every foreign jurisdiction to recognize the validity of such divorces, we must accord the same validity to the foreign divorces obtained under the same circumstances. But the present case is within the authority of the recent decision of Vice-Chancellor Reed in *Magowan v. Magowan* ([N. J. Ch.] 39 Atl., 364). There the wife sued the husband for maintenance, and he pleaded a decree of divorce granted by the Court of the Territory of Oklahoma, and the decree in that case recited that Magowan was a resident of that Territory. The wife, in answer to it, replied that he was not a resident of that Territory; that he had imposed upon the Court in that respect. But the learned Vice-Chancellor held that the recital in the decree was conclusive against the defendant in that suit, who had notice of it. That case goes much further than it is necessary to go here, because here it is an admitted fact in the case that the husband was a *bona fide* resident domiciled in the Territory of Utah at the time the suit was brought and for more than a year prior thereto. I will advise a decree in favor of the defendant.”

In *Kinnier v. Kinnier*, 45 New York, 535, 542, it is held:

“A judgment of a sister State cannot be impeached by showing irregularities in the form of proceedings or a non-compliance with some law of the State where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the Court in which it is rendered.”

This language was quoted in *Laing v. Rigney*, 160 U. S., 531, by the Court in the opinion. This is a strong case and practically declares that the forum wherein a judgment is rendered is the place to attack the same unless it is absolutely void. It is an unheard of doctrine to declare the judgment of the Court of a sister State a nullity without direct allegations and proof sufficient in law to show that the same is absolutely void. There is not a single direct allegation made by defendants in error challenging the validity of the decree in this case except as stated that service was constructive. The ad-

mitted residence of the plaintiff in error confers jurisdiction over the plaintiff in that suit and over the *rem* or *res* without the slightest question, and this Court cannot under its own precedents for almost a century do anything but reverse the judgment in this cause. Particularly are the cases of *Cheever v. Wilson*, *Cheely v. Clayton*, and *Pennoyer v. Neff*, directly in point and must control the Court in this case.

The ridiculous attitude taken by the New York Courts should be sufficiently rebuked so that they will take notice of the law as declared by the highest Court in the land, as they have continued to disregard the decision of this Court in *Cheely v. Clayton*, and have followed the old precedents and have recently gone farther than ever, holding in the case of *McGown v. McGown*, 19 Appellate Division, 368, that the plaintiff (wife) who was divorced in North Dakota in full compliance with the laws of that State, and subsequently married there to another man, the defendant (husband) being constructively served was guilty of adultery and granted the defendant in that suit an absolute divorce in an action in New York, awarded him the custody of the minor child and refused to permit the mother to even see the child for about one year and one-half, absolutely ignoring the universal principle that a marriage valid where contracted, is valid everywhere. The lower Court in this same case announced the amazing conclusion that this woman had one husband in Dakota and another one in New York. We do not mean to criticise the intermediate Courts for they must follow the precedents of the Court of Appeals. We hope, therefore, that this Court will declare the law in terms so plain and unmistakable that the highest Court of that State will recede from its present indefensible and inexcusable position on this question.

There is the further question touched on lightly in the discussion of the *Cheever v. Wilson* case that is not in this case, but we do not feel like closing this portion of our brief without making a few observations upon it,—thinking perhaps the Court may in reviewing the various

points that may arise, take it up for consideration incidentally if not directly. The proposition we refer to is whether the Courts of another State can re-try the findings on recitals of fact in a decree of divorce upon the question of the residence of the plaintiff. The statutes upon residence are uniform in many of the States, except as to the length of time of residence required before an action for divorce can be instituted. This is one of the facts to be proved on the trial. The Court granting the decree hears and determines the evidence on this point, and if judgment of divorce is to be awarded, finds that the plaintiff was a *bona fide* resident of the county, and had been a resident in good faith of the State for the period required by statute at the time of the commencement of the action. The Courts of some of the States in collateral proceedings re-try this question of fact and often find that the Court of such other State granting the decree erred in its findings and judgment, and declare the same null and void. In this manner the jurisdiction is impeached and the judicial proceedings of a sister State are canceled. A case that may be cited by our opponents is that of *Thompson v. Whitman*, 18 Wallace, 457. This was a case arising under a statute in New Jersey, providing that in the event of certain violations of the fishery or oyster laws, that two justices of the peace of the county in which the transgressions of the statute occurred could punish the offenders and confiscate their property. This was done, and an action was instituted in the United States Court by the parties for damages, and the findings and judgment of these justices were offered as a defense, and the Court instructed the jury that the same was not conclusive only *prima facie* evidence of the facts therein recited. The jury found that the alleged violation of the law occurred in a county other than that in which the parties were tried and in view of this fact the Court declared that the justices acted without jurisdiction. We do not think this case is parallel or in any degree meets the point suggested in divorce actions. In *Thompson v. Whitman*, the case turns on geographical location. The act com-

plained of occurred in another county, and this being true there was no evidence whatever to sustain the judgment. There was a total want of evidence. In this other class of cases it is a question of the weight of the evidence. The Court of the State granting the decree, says the evidence as to residence is sufficient. The Court of another State retries the question and declares the evidence to have been insufficient. If this view should prevail, a judgment of divorce never could become final. The jurisdictional facts could be attacked in every State of the Union, even after years had elapsed. Again, this finding of the Court rendering the decree confers jurisdiction *eo instanti* over the plaintiff and over the *status res* or subject matter of the action, and an adjudication thereon is final and conclusive, unless appealed from or unless proper application is made in the same forum to vacate the judgment. If an attack were made on the jurisdiction and the fact established that the divorce action was tried and determined in a county or State other than those recited in the decree, then the case of *Thompson v. Whitman*, would be in point.

There was a total want of evidence in this case while in the class we refer to there is always evidence in a greater or less degree to sustain the judgment of the Court and it is not within the power of the Courts of another State to retry this question when once determined and to find that error of judgment was committed, and that the proceedings are a nullity. We have a case in this Court sustaining the view of the law here expressed. In the case of the *New Lamp Chimney Co. v. Ansonia Brass Co.*, 91 United States, 659-660, it is held:

“Such a petition might properly be made by the president of the company, and be by him presented to the District Court, if he was thereto duly authorized at a legal meeting called for the purpose by a vote of the majority of the corporators; and whether he was so authorized or not was a question of fact to be determined by the District Court to which the petition was presented; and the rule in such cases is, that if there

“be a total defect of evidence to prove the essential fact,
 “and the Court find it without proof, the action of the
 “Court is void; but when the proof submitted has a legal
 “tendency to show a case of jurisdiction, then, although
 “the proof may be slight and inconclusive, the action of
 “the Court will be valid until it is set aside by a direct
 “proceeding for that purpose. Nor is the distinction
 “unsubstantial, as in the one case the Court acts with-
 “out authority, and the action of the Court is void; but
 “in the other the Court only errs in judgment upon a
 “question properly before the Court for adjudication,
 “and of course the order or decree of the Court is only
 “voidable.” *Staples v. Fairchild*, 3 Comst., 46; *Miller*
v. Brinkerhoff, 4 Den., 119; *Vorhees v. Bank*, 10 Pet.,
 473; *Kinnier v. Kinnier*, 45 N. Y., 539.

Referring to the case of *D'Arcy v. Ketchum*, 11 How-
 ard, 165, the Court in *Thompson v. Whitman*, 18 Wal-
 lace, 465, says:

“In that case it was held by this Court that the judg-
 “ment was void as to the defendant not served, and that
 “the law of New York could not make it valid outside of
 “that State; that the constitutional provision and act of
 “Congress giving full faith, credit and effect to the judg-
 “ments of each State in every other State do not refer to
 “judgments rendered by a Court having no jurisdic-
 “tion of the parties; that the mischief intended to be
 “remedied was not only the inconvenience of retrying a
 “cause which had once been fairly tried by a competent
 “tribunal, but also the uncertainty and confusion that
 “prevailed in England and this country as to the credit
 “and effect which should be given to foreign judgments,
 “some Courts holding that they should be conclusive of
 “the matters adjudged, and others that they should be
 “regarded as only *prima facie* binding. But this uncer-
 “tainty and confusion related only to valid judgments;
 “that is, to judgments rendered in a cause in which the
 “Court had jurisdiction of the parties and cause, or (as
 “might have been added) in proceedings *in rem*, where
 “the Court had jurisdiction of the res. No effect was
 “ever given by any Court to a judgment rendered by a
 “tribunal which had not such jurisdiction.”

It is unnecessary to add that taking these two cases,
 viz.: *Thompson v. Whitman* and the *New Lamp Chim-*

ney Co. v. Ansonia Brass Co. together and bearing in mind the proposition we submit and the distinction between the cases that the precedents of this Court are fully in line with our theory of the law and that the conclusion that must be reached by the Court is that the findings of the Court of a sister State upon questions of fact are conclusive.

The same legal principle and the same line of reasoning governs in this class of cases as prevailed in the international question that arose in the case of Martin Koska, a naturalized citizen of the United States, who, in 1848, went from this country to Austria to make preparations to bring his family over here, and while in Trieste was arrested by the Austrian Government under the claim or pretence that he owed military service to the Austrian Government, he having been born an Austrian citizen.

His release was demanded by the United States officers on the ground that he was an American citizen, and the answer of the Austrian Government was that he was born a subject of the Emperor of Austria and the privilege of changing his allegiance did not vest in him but vested in his government, and that this privilege had not been granted by the Austrian Government. The demand for his release was made by Capt. Ingraham of the United States sloop of war *St. Louis*, at the instigation of the proper officers of this government and Koska's release was effected.

The better opinion appears to be these days that, the right to change citizenship rests with the individual and not with the government, and the good faith thereof must be questioned, if at all, in the place where residence or citizenship is transferred; and so in the same manner the right of a wife to select her domicile separate and apart from her husband upon sufficient cause, rests with her and not upon the narrow restrictions and burdens imposed by the common law of a wife's domicile being that of her husband, irrespective of her wishes or enlightened legislation on the subject.

It seems proper that there should be a fixed and uniform rule on this subject and the social conditions of

the country would be ameliorated, much misery and anguish would be averted, and much fraud and perjury would cease. It seems right that one should know when and where one's motives, good faith, residence and citizenship would be safe from attack, and when and where one could rest secure in the constitutional guarantee of one's country.

We submit in conclusion that the judgment of the Court below should be reversed upon the grounds that, an affirmance thereof would be against the interests of the people and public policy.

As heretofore suggested it has been a subject of much discussion and deep interest to the legal profession and the citizens of the different States, to obtain if possible a uniform system of divorce laws. The divers laws of the different States are so utterly in conflict with each other as to often leave a citizen in grave doubts as to whether he is a married man with all the responsibilities attached thereto, or a single man, enabled under the law to repudiate a woman who may in good faith have joined him in marriage.

It is respectfully submitted, that a condition of affairs wherein one would be married in a given State, divorced in another, and a bigamist in another, all upon exactly the same state of facts and arising from the same transaction, is contrary to the public policy of the country and should not be tolerated by the United States or the the Courts thereof.

We submit in view of the premises and the law of the land that the judgment of the lower Court should be reversed and the cause remitted for further proceedings.

Respectfully submitted,

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For Plaintiff in Error.